

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
1:06cv135**

RALPH H. CLOANINGER,

Plaintiff,

Vs.

**JOHN T. McDEVITT, in his official capacity
of Sheriff of burke County, North Carolina;
YONGLA LO a/k/a JOE LO, individually and
in his official capacity as Deputy Sheriff of
Burke County, North Carolina; STEVEN
PARLIER, individually and in his official
capacity as Deputy Sheriff of Burke County,
North Carolina; and LIBERTY MUTUAL
INSURANCE COMPANY, as surety,**

Defendants.

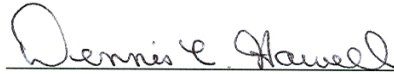
ORDER

THIS MATTER is before the court on defendants’ Motion to Dismiss (#7) and plaintiff’s Motion to Amend the Complaint (#10). As to the Motion to Amend, plaintiff need not seek leave of court to amend his complaint where only a Motion to Dismiss, but not an answer, has been filed, inasmuch as a Motion to Dismiss is not a “responsive pleading.” Smith v. Blackledge, 451 F.2d 1201, n.2 (4th Cir. 1971). The Motion to Amend will be denied as moot, and defendants will be instructed to file their answers or other responsive pleadings within ten days of receipt of this Order. Inasmuch as the Amended Complaint has already been filed, the pending Motion to Dismiss will be denied without prejudice as moot. Finally, counsel for plaintiff is advised that a consent/refusal form is required to be filed. See L.R. 73.1.

ORDER

IT IS, THEREFORE, ORDERED that plaintiff's Motion to Amend the Complaint (#10) is **DENIED** as moot, and defendants' Motion to Dismiss (#7) is **DENIED** without prejudice as moot. Defendants are allowed 10 days from receipt of this Order to Answer or otherwise respond to the Amended Complaint.

Signed: June 5, 2006

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Dennis L. Howell
United States Magistrate Judge

